Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting	)	
Safeguards of Sections 271 and 272 of	)	CC Docket No. 96-149
the Communications Act of 1934, as	)	
Amended	)	

RESPONSE OF U S WEST, INC. TO PETITIONS FOR RECONSIDERATION

Richard A. Karre
Kathryn Marie Krause
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2791

Attorneys for

U S WEST, INC.

Of Counsel,
Dan L. Poole

April 2, 1997

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SUMMARY

Several parties to this proceeding seek to overturn portions of the First Report and Order. For the most part, they simply re-hash arguments the Commission has already considered and rejected, adding nothing new of any significance.

Chanting the mantra of operational independence, AT&T and MCI seek to cripple the BOCs' separate affiliates by convincing the Commission to impose unneeded additional restrictions on them – restrictions not contemplated by the Communications Act. These proposals would serve only AT&T and MCI by limiting the BOCs' ability to provide meaningful interLATA competition. The Commission has previously rejected these proposals and should do so again.

In a similar vein, MCI and Teleport seek to avoid having to compete with the BOCs' separate affiliates in the local arena. They would have the Commission prohibit the separate affiliates from providing local service, even though they can point to no provision of the Act that might direct such a result. This, too, has already been rejected in this proceeding; MCI and Teleport provide no reason to change that.

Time Warner asks the Commission to rewrite the Act (in the guise of a "clarification") to impose a separate affiliate requirement on the BOCs' provision of video programming. The Act does not require this result. Indeed, we will demonstrate that it is prohibited by the Act.

In three respects, we agree with BellSouth that the Commission overstepped its authority in the Report and Order. First, BellSouth argues (as U S WEST did in

its own Petition for Reconsideration) that the Commission erred by imposing a separate affiliate requirement on the BOCs' out-of-region provision of interLATA information services. Although BellSouth espouses a slightly different statutory interpretation than U S WEST's, it reaches the same conclusion: the Act did not intend to impose such a requirement on the BOCs, and the Commission should not do so.

We also agree with BellSouth that the Commission has taken much too limited a view of "joint marketing." The Act refers to "marketing and selling," but the Commission seems to read that phrase to include only sales activities. Yet "marketing" includes many activities far in advance of sales – and indeed many activities after the sale has taken place.

Finally, we agree with BellSouth that the Commission should not have prohibited an affiliate other than the separate affiliate from providing installation, maintenance and repair for the switching and transmission facilities of both a BOC and its separate affiliate. Section 272 does not purport to address the relationship between a BOC and other affiliates, or the relationship between a separate affiliate and another affiliate. It provides no justification for the result reached by the Commission.

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RESPONSE OF U S WEST, INC. TO PETITIONS FOR RECONSIDERATION

U S WEST, Inc. ("U S WEST") hereby responds to the various petitions for reconsideration and/or clarification of the First Report and Order[1] filed in the above-referenced proceeding,[2] which were noticed for public comment.[3]

I. OPERATIONAL INDEPENDENCE

AT&T and MCI both argue that the Federal Communications Commission ("FCC" or "Commission") misinterpreted Section 272(b)(1) by requiring too little operational independence between a Bell Operating Company ("BOC") and its

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[1] In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 5 Comm. Reg. (P&F) 696 (1996) ("First Report and Order" or "Order").

[2] Petitions for Reconsideration and/or Clarification filed Feb. 20, 1997, by the Association for Local Telecommunications Services ("ALTS"); AT&T Corp. ("AT&T"); BellSouth Corporation ("BellSouth") Cox Communications, Inc. ("Cox"); MCI Telecommunications Corporation ("MCI"); SBC Communications Inc. ("SBC"); Teleport Communications Group Inc. ("TCG"); Time Warner Cable ("Time Warner"); and U S WEST.

[3] Public Notice, Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, Report No. 2178, rel. Mar. 6, 1997.

Section 272 affiliate. AT&T argues that the restrictions the Commission imposed on the BOCs under section 272(b)(1) are insufficient to assure operational independence "under the ordinary meaning of that phrase."[4] AT&T thus attempts to rehash – with no support – its prior argument that Congress intended to impose specific restrictions by requiring operational independence, but somehow failed to include those specific restrictions in the statute.

AT&T further argues that the Commission failed to offer sufficient factual or analytical support for its conclusions regarding Section 271(b)(1);[5] that the requirements found in Section 274(b) clearly demonstrate the need for more separation than the Commission required;[6] and that the Commission failed to explain why it had imposed more restrictions in other proceedings with respect to operational independence than it did in the current proceeding.[7]

MCI attacks the Commission's resolution of this issue with a broad brush, arguing that the joint ownership of property (such as administrative space),[8] allowing the Section 272 affiliate to provide local exchange service[9] (just as any other competitive company would), and the ability to share administrative services[10] eviscerate any operational independence the Commission purports to mandate.

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[4] AT&T at 3-4.

[5] Id. at 4-6.

[6] Id. at 6-8.

[7] Id. at 8-10. See also MCI at 5-6.

[8] MCI at 7-8.

[9] Id. at 3-4.

[10] Id. at 8-9.

MCI claims that the existence of multiple non-structural safeguards are insufficient to support the Commission's determination that structural separations beyond what it ordered were unnecessary to assure operational independence.[11]

Neither AT&T nor MCI demonstrates that the Commission's Order undermines Congressional intent that a BOC not subsidize its separate affiliate or discriminate in its favor. Indeed, because the Commission's Order does accomplish these objectives, neither party could make out such a case. The Commission's approach to operational independence was generally correct and should be changed in only one respect, discussed more fully below.

A. The Language Of Section 272(b)(1)

The plain language of Section 272 (especially as contrasted with Section 274) suggests that Congress expected certain absolute "separations" (which it specifically outlined in Section 272(b)(2)-(5)). Above and beyond those separations it left it to the Commission to determine whether any additional structural separations were necessary to ensure operational independence. AT&T argues that the Commission did not elaborate on its statutory "structural" rationale in reaching the conclusion that Section 272(b)(1) does not require all of the separation requirements outlined in Section 274(b).[12] AT&T is incorrect.

The Commission made clear why it did not adopt unilaterally all of the specified separations in Section 274(b). It declined to do so because of the different language and structure of the two provisions: In Section 274(b), Congress outlined

[11] Id. at 7-8.

specifically what was necessary to accomplish operational independence; in Section 272(b)(1) it required operational independence, leaving it to the Commission to determine what specific steps that might require.[13]

The Commission noted that Section 274(b) generally requires "operational independence," followed by nine specific subsections.[14] In the Commission's view, this suggested that the specific, delineated requirements accomplished the operational independence contemplated by the statutory provision. On the other hand, Section 272(b) includes as one of the "Structural and Transactional Requirements" a specific requirement that the BOC and its Section 272 affiliate are to operate independently. Thus, the Commission concluded that Congress intended for the Commission to determine the specific separation requirements -- above and beyond the requirements of Section 272(b)(2)-(5) -- necessary to ensure operational independence.[15]

When Congress wanted to impose a specific separation requirement, it knew how to do so explicitly. When it did not explicitly state a separation requirement, it either intended none, or it intended to leave the matter to the Commission's

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[12] AT&T at 7-8.

[13] U S WEST has argued that the operational independence requirement was a means, rather than an end, in accomplishing the dual Congressional goals the Commission has articulated: increased competition and controls on inappropriate discrimination and cross-subsidization. Reply Comments of U S WEST, filed herein Aug. 30, 1996, at 9-10 ("U S WEST Reply"). If the operational independence would not promote one of those goals or if it might promote one goal but substantially defeat another, it is not necessary under Section 272(b)(1).

[14] Order, 5 Comm. Reg. at 747 ¶ 156.

[15] Id. at 747 ¶¶ 156-57.

discretion.[16] If, as AT&T suggests,[17] Congress had intended to impose the same requirements on a Section 272 affiliate as it imposed on a Section 274 affiliate, it would not have drafted separate sections. Indeed, as the Commission noted, the common requirements of Sections 272 and 274 demonstrate that Congress intended they by considered separately.[18]

B. The Sharing, Integration, And Business Activities The Commission Allowed Do Not Violate Section 272(b)(1)

MCI argues that the Commission has compromised the prescribed operational independence by permitting the BOCs and their Section 272 affiliates to own property jointly where there are no telecommunications facilities or operations involved and by allowing them to share administrative services.[19] Beyond *ipse dixit*

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[16] AT&T cites to rules of statutory construction that suggest the Commission erred in its interpretation. AT&T at 7-8. Other rules of statutory construction, however, support the Commission's actions. Specifically, the rule of statutory construction that Congressional silence in one aspect of a legislative enactment (i.e., Section 272(b)(1)), where there is specific language dealing with the matter in another section (i.e., Section 274(b)), strongly suggests a different Congressional intent with respect to the two provisions. See Comments of U S WEST, CC Docket No. 96-115, filed Mar. 17, 1997, at 7 n.15. The existence of the word "written" in the one provision and its absence in the other invokes the "rule of construction that an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance." Field v. Mans, 116 S. Ct. 437, 442 (1995). See also Gozlon-Peretz v. U.S., 498 U.S. 395, 404 (1991); American Civil Liberties Union v. Reno, et al., 929 F. Supp 824, 850 (E.D.Pa. 1996). And see Comments of MCI, filed herein Aug. 15, 1996, at 15 n.36 ("It is well settled that an explicit exclusion appearing in one provision of a statute but not in another provision of the same statute logically implies that the exclusion is inapplicable as to the latter provision.") citing to League to Save Lake Tahoe, Inc. v. Trounday, 598 F.2d 1164, 1171 (9th Cir. 1979).

[17] AT&T at 7.

[18] Order, 5 Comm. Reg. at 747 ¶ 157.

[19] MCI at 3.

statements, however, MCI provides no new arguments or evidence to support its position.

Similarly, AT&T suggests that the restrictions imposed on the BOCs are insufficient to assure operational independence (with the implication that everything the Commission allowed the BOCs to share was inappropriate). Both AT&T and MCI argue that the Commission's prior Computer II Orders particularly suggest that the Commission totally missed the mark in its resolution of operational independence.[20] Finally, AT&T complains that in resolving the matter of operational independence, the Commission was guided by a "standard that it never adequately identifies, much less explains."[21]

> As the Commission stated, the provisions of Section 272 are meant to
>
> ensure that competitors of the BOC's section 272 affiliate have access to essential inputs, namely, the provision of local exchange and exchange access services, on terms that do not discriminate against the competitors and in favor of the BOC's affiliate. . . . Access to such inputs on nondiscriminatory terms will enable a new entrant to compete effectively, assuming it is at least as efficient as the BOC and/or its section 272 affiliate. At the same time, Congress also was sensitive to the value to the BOCs of potential efficiencies stemming from economies of scale.[22]

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[20] AT&T at 8-10; MCI at 5-6.

[21] AT&T at 5.

[22] Order, 5 Comm. Reg. at 708 ¶ 13. As with any regulatory order, particularly one as significant and sizable as the one in this proceeding, discrete Commission remarks can be found and cited to support various positions. For example, in support of its arguments that the Commission failed to meet both the literal and policy requirements of Section 272, MCI cites to ¶¶ 6 and 9 of the Commission's Order. MCI at 2. Yet, MCI never proffers any analysis or facts to demonstrate that the Commission's resolution of the operational independence issue allows BOCs to use their existing market power in local exchange services to obtain an anti-competitive advance in new markets (the subject of ¶ 6). Certainly, in allowing a

In accomplishing these dual Congressional objectives, the Commission sought "to open all telecommunications markets to robust competition" while refraining from imposing "requirements on the BOCs that will unfairly handicap them in their ability to compete."[23]

The Commission also stated that the Section 272 requirements were "designed, in the absence of full competition in the local exchange marketplace, to prohibit anticompetitive discrimination and cost-shifting[.]"[24] The Commission specifically described the type of discrimination that might be anticompetitive and the type of cost-shifting that might occur that could harm competitors and consumers alike.[25] Throughout its Order, the Commission's analysis remained focused on its interpretation of the statute and the evils it was meant to correct or alleviate.

What really bothers MCI and AT&T is that the Commission refused to cripple the BOCs' separate affiliates: it did not deprive the BOCs of every economy

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Section 272 affiliate to offer local exchange services, the BOC is not operating in an anticompetitive manner to the extent the essential inputs to the provision of such service are offered in a nondiscriminatory manner -- something assured by the Commission's Interconnection Order. MCI also fails to demonstrate that a BOC will be able to engage in anticompetitive discrimination or cost-shifting (the subject of ¶ 9). Indeed, in U S WEST's Reply Comments in this proceeding we explained how such activities would be impossible given the Commission's other statutory implementing orders. U S WEST Reply at 3-4, 5-8.

[23] Order, 5 Comm. Reg. at 708 ¶ 13.

[24] Id. at 707 ¶ 9.

[25] Id. at 707-08 ¶¶ 11-12. See also id. at 709 ¶¶ 16-17.

of scope and scale they potentially have;[26] it did not preclude the Section 272 affiliate from independently offering local exchange service through resale or the purchase of unbundled network elements;[27] and it permitted a third entity (a non-Section 272 BOC affiliate) to provide services to both entities.[28]

Indeed, in rejecting the extreme separation arguments of AT&T and MCI, the Commission made clear that its goal -- consonant with the goal of Congress in passing the 1996 Act -- was to "establish a regulatory framework that enables service providers to enter each other's markets and compete on an equal footing by not allowing one service provider to game regulatory requirements in such a way as to hinder competition."[29]

AT&T and MCI attempt to engage in just that sort of "gaming." They advocate the need for greater separation but make no attempt to demonstrate how the prohibitions they urge – prohibitions the Commission has already rejected – track more truly with the legislative language the Commission was construing,

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[26] Id. While the Commission did not totally deprive the BOCs of these efficiencies, its unduly broad reading of Section 272(c) certainly operates to depress those efficiencies, to the extent a BOC cannot reasonably see itself making certain of its "services" or "information" available to third parties for the asking.

[27] MCI, in particular, objects to this ruling. MCI at 4. Similarly, TCG's entire filing for reconsideration focuses on this issue. MCI never discusses the reasoned analysis engaged in by the Commission with respect to the specific statutory provisions dealing with "successors and assigns." Order, 5 Comm. Reg. at 787-88 ¶¶ 309-11. TCG, on the other hand, acknowledges the Commission's discussion and resolution of this issue (TCG at 2 & n.2, 4) but argues that the Commission's resolution of the larger issue was incorrect and inadequate to protect against Regional Bell Operating Company bad-acting.

[28] MCI at 6; AT&T at 4 & n.8.

[29] Order, 5 Comm. Reg. at 709 ¶ 19.

ensure greater access to essential inputs, more effectively prevent discrimination, or better ensure against improper cost allocations.[30] Nor do they demonstrate how the Commission's determination of the meaning of "operational independence," in conjunction with the additional requirements of Sections 272(b)(2)-(5), (c), and (e) do not provide sufficient protections to enable the prosecution of violations through a complaint proceeding.

1. Sharing of Services

Both AT&T and MCI believe that BOCs and their Section 272 affiliates should be precluded, in the name of operational independence, from sharing any services or from having such services provided to each of them from a different -- but affiliated -- entity.[31] The Commission, on the other hand, specifically addressed the matter of sharing of services (but for a single exception) as a matter of Section 272(b)(3) interpretation.[32]

Regardless of the applicable provision, the Commission should not change its position on the matter of service sharing, except in one respect discussed more fully below (see infra note 37). First, neither the language of Section 272(b)(1) nor (b)(3)

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[30] MCI parrots an argument first raised by AT&T earlier in this proceeding: if the Commission allows the separate affiliates to provide local service, the BOCs will allow their networks to fall into disrepair and ultimately become obsolete. MCI at 4; AT&T Comments, filed herein Aug. 15, 1996, at 20-22 (arguing that the BOC would leave its network "unimproved and atrophied"). As we stated in response to AT&T's argument, for a BOC to starve its principal asset would be an economically irrational strategy. In any event, if a BOC can construct an "overlay" network, other parties can do the same, and competition will be furthered, not harmed. U S WEST Reply at 10-11 n.28.

[31] AT&T at 9-10; MCI at 3-4.

[32] Order, 5 Comm. Reg. at 748-49 ¶ 163, 752 ¶ 178.

expressly prohibits shared services.[33] Absent an express prohibition, such services can be shared provided the provision of such services complies with other relevant portions of the Act and the Commission's rules.[34] Second, as the Commission noted, there is no legislative support for the type of extreme separation AT&T and MCI advocate.[35]

Third, even if there were a question about the propriety of such sharing as between the BOC and the Section 272 affiliate directly (which we believe there is not), the provision of such services by a parent or other affiliate is nowhere addressed by the statute, let alone prohibited.[36] Section 272 addresses only the relationship between a BOC and its separate affiliate; it does not address the provision of services to both by another affiliate. That situation does not compromise the operational independence of the Section 272 affiliate as it relates to the BOC because the BOC is not providing any service at all.[37] For all these reasons, the Commission should again reject AT&T's and MCI's arguments.

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[33] Id. at 752 ¶ 178.

[34] Id. at 753 ¶ 181.

[35] While such a prohibition might have been included in the House bill, that was not the version that survived. Id. at 752 ¶ 178 n.432.

[36] Id. at 753 ¶ 182.

[37] For the same reasons, U S WEST supports BellSouth's request that the Commission reconsider its determination that another affiliate may not perform operating, installation, and maintenance services for both the BOC and the Section 272 affiliate. As BellSouth notes (at 2, 6-7), Section 272(b)(1) may fairly be read to control only the relationship between a BOC and a separate affiliate, and Congress took great pains to distinguish a "Bell operating company" from an affiliate of such a company (see 47 U.S.C. § 153(4)). The Commission concluded that the remainder of the subsections in Section 272(b) are thus limited (Order, 5 Comm. Reg. at 753 ¶ 182). Section 272(b)(1) is not different in that respect.

2. The Provision of Local Exchange Service

MCI and TCG (and, to a lesser extent, AT&T) argue that Congress intended to separate a BOC's exchange and interLATA services and that this intent precludes a Section 272 affiliate from providing exchange service.[38] Rhetoric aside, however, no party can point to any statutory language that would even suggest Congress's intent to prohibit this activity. A Section 272 affiliate purchasing resold BOC service or unbundled network elements at nondiscriminatory rates and offering its own service packages to the public is operating as independently as any other competitive local provider. As a new market entrant with no market power, a Section 272 affiliate cannot exercise "market dominance to the detriment of competition."[39]

Finally, the Commission did not make its rulings in the abstract. It supported its decision with references to a panoply of other regulations that would work in a complementary fashion with its decision.[40] In light of the fact that the statutory interpretation was not at odds with the express language of the statute and that the Commission (within the bounds of evidence presented) has certain discretion with regard to the framework of business operations, the Commission cannot be said to have acted erroneously.

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[38] See, e.g., MCI at 7-10; TCG at 3; AT&T at 1-2, 4.

[39] TCG at 7.

[40] With respect to the Section 272 affiliate's provision of local exchange services, the Commission supported its decision by reference to cost accounting and affiliate transaction rules, Sections 251 and 252 of the Act, its Interconnection Orders (Order, 5 Comm. Reg. at 789-90 ¶¶ 314-15), as well as the predatory pricing prohibitions of the antitrust laws (id.) and state regulations (id. at 788 ¶. 311).

C. Prior Commission Precedent

AT&T and MCI argue that the Commission did not adequately explain why it deviated from earlier regulatory rulings with respect to affiliations and operational independence.[41] They are simply incorrect. The Commission acknowledged at least three structural separation regimes it had imposed in the past (i.e., Computer II dealing with structural separation in an environment where the affected companies were dominant in one of the markets; Competitive Carrier where there was ostensibly less dominance in the affected market; and the BOC Separations Order).[42] While not unaware of these prior precedents, the Commission rejected certain of their mandates primarily because it determined that the imposition of such restrictions was "not required by the language of Section 272(b)(1)."[43] Nor, as the Commission's analysis makes evident, were additional restrictions required as a matter of regulatory or public policy. There is no doubt that the Commission "suppl[ied] a reasoned analysis"[44] for its determinations.

While the Commission may have required more separation in its Computer II proceedings and with respect to the separations mandated there, the context of the

[41] AT&T at 8-9; MCI at 10-11.

[42] Order, 5 Comm. Reg. at 746 ¶¶ 154-55, 748-49 ¶ 163. See also id. at 752-53 ¶ 179 (addressing a separation not required under the Commission's Computer II rules).

[43] Id. at 750 ¶ 170.

[44] AT&T at 9 (arguing that judicial precedent mandates that such an analysis be supplied when an agency changes course by rescinding a rule). (Of course, the Commission was not "rescinding a rule" in this proceeding but engaging in statutory construction and the imposition of implementing regulations based on its accumulated expertise and predictive judgment.)

adoption of those rules is significantly different than the current context.[45] First, those rules were a seminal regulatory attempt to resolve difficult market questions about the scope of regulated versus unregulated services at a time when converging technology and carrier offerings were certain to overlap or merge, absent regulatory intervention. The fact that the Commission might have been very conservative in that regulatory regime does not support the proposition that, more than a decade later, and having rejected in large part structural separation as an "ideal remedy," the Commission must impose the same type of requirements in the holy name of "operational independence."

To the extent that the markets being addressed by the 1996 Act and this proceeding are different than those addressed previously by the Commission (with both the markets and the technology feverishly driving to even differently defined markets) and are populated by large, well-endowed competitors, the Commission certainly is not obliged to adopt rules akin to those adopted in a prior regulatory age. To the extent the Commission believes that operational independence between a BOC and its Section 272 affiliate can now be assured through a combination of structural separation and cost accounting rules, mandated non-discrimination obligations, and written documents supporting transactions between affiliates,[46] the Commission is not precluded from making that discretionary determination.

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[45] Incredibly, AT&T asserts that the Commission's prior proceedings and rulings were "offered in contexts almost identical to that addressed by § 272." AT&T at 9.

[46] Order, 5 Comm. Reg. at 750 ¶ 167.

II. THE COMMISSION SHOULD NOT REQUIRE THE BOCS TO PROVIDE OUT-OF-REGION INTERLATA INFORMATION SERVICES IN A SECTION 272 AFFILIATE

Like U S WEST, BellSouth seeks reconsideration of the Commission's determination that Section 272(a)(2)(B) requires the provision of out-of-region interLATA information services through the vehicle of a Section 272 subsidiary.[47] Although BellSouth uses a somewhat different route, it reaches the same result that U S WEST did: the Commission should not impose such a requirement on the BOCs. At a minimum, the Commission has chosen the less-likely statutory interpretation here, and it has done so with no indication of the benefits it thereby hopes to achieve.[48] The Commission should reverse itself as to this portion of the Order.

III. OTHER ISSUES

A. The Definition of "Joint Marketing"

U S WEST supports BellSouth's request for reconsideration with respect to the extremely conservative position the Commission took with regard to the scope of "joint marketing" in Section 272(g)(3).[49] While the Commission correctly included customer inquiries and actual sales within its definition,[50] it excluded -- inappropriately -- planning, design, and development activities from the definition.

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[47] BellSouth at 10-13.

[48] Order, 5 Comm. Reg. at 727 ¶¶ 85-87.

[49] BellSouth at 8.

[50] Order, 5 Comm. Reg. at 784 ¶ 296.

Thus, at least theoretically, a BOC that aids in the design, planning, and development of a service with its Section 272 affiliate must engage in similar activities with respect to other entities (because of the nondiscrimination provisions of Section 272(c)(1)). Because the Commission's determination on the scope of the term "joint marketing and sales" is unduly restrictive and leads to a bizarre result with respect to the application of the non-discrimination provision, the Commission should reconsider its decision on this issue.

BellSouth correctly observes that the natural reading of the phrase "joint marketing and sales" is that there are two referenced activities, not one.[51] In ordinary usage, marketing is not constrained as the Commission has concluded. Any intelligent "marketing" requires a predicate product concept, product design, product development, and product management. Thus, U S WEST agrees that the Commission "should give the term 'joint marketing' its natural meaning"[52] to include product design and development.

B. Video Programming

Time Warner asks the Commission to clarify that BOCs may provide video programming services only through a Section 272 affiliate.[53] In the OVS Second Report and Order, the Commission declined to impose a separate affiliate

[51] BellSouth at 9.

[52] Id. at 10.

[53] Time Warner at 6.

requirement on the BOCs' operation of open video systems.[54] In its Order in this proceeding, the Commission concluded that the BOCs need not utilize a separate affiliate to provide interLATA telecommunications transmission incidental to the provision of video, audio, and other programming services.[55] Time Warner wishes to interpret these two holdings as the implicit imposition of a separate affiliate requirement on the BOCs' provision of programming services, even though the Commission has nowhere articulated such a requirement.

The foundation of Time Warner's argument is its misreading of paragraph 94 of the Commission's Order. There, the Commission discussed the impact of Section 272 on the BOCs' provision of "incidental interLATA services," concluding that the BOCs need not use a separate affiliate to provide the interLATA transmission incidental to programming. This, Time Warner tells us, "implies . . . that the video programming service itself is to be treated just as any other . . . information service . . . , fully subject to the separate affiliate requirements . . .[.]"[56]

But paragraph 94 does not purport to define programming as an information service; it does not even discuss information services, as such. Indeed,

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[54] In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order, 3 Comm. Reg. (P & F) 196, 276 ¶ 249 (1996).

[55] Order, 5 Comm. Reg. at 729 ¶ 94.

[56] Time Warner at 4. In this, Time Warner grossly overstates the effect of Section 272 on information services generally. That provision affects only interLATA information services. Regardless of anything else, the BOCs remain free to provide intraLATA information services on an integrated basis.

paragraph 94 appears in a section (III.E.) of the Order titled "Incidental InterLATA Services;" the Commission's discussion of "InterLATA Information Services" appears in an entirely different section (III.F.).

Even if the Commission were to label video programming an information service, it could not apply the separation requirements of Section 272 to that service. The limitations on a BOC's provision of interLATA information services are exclusively a concept of Title II regulation. But a BOC's provision of video programming, as such, is governed solely by Title VI of the Communications Act. If Time Warner has in mind a BOC's provision of an open video system, Section 653(c)(3) expressly precludes the application of Title II. If, on the other hand, Time Warner means a BOC's provision of video programming in another context, Section 651(a) prescribes the regulatory treatment. It expressly states that a common carrier providing video programming (other than via a radio-based system or the common carriage of video traffic) is subject to the requirements of Title VI.[57] Nowhere does this provision impose Title II regulation on such programming.[58]

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[57] 47 U.S.C. § 571(a)(3)(A).

[58] The omission is significant. When Congress intended to impose Title II regulation on a common carrier's video programming services, it articulated the obligation: Section 651(a)(2) (47 U.S.C. § 571(a)(2)) expressly subjects the common carriage of video programming to Title II regulation. We thus cannot assume that video programming is subject to Title II unless expressly exempted.

Therefore, regardless of the context, Section 272 cannot be read to impose a separate affiliate requirement on the BOCs' provision of video programming.

Respectfully submitted,

U S WEST, INC.

By: 

Richard A. Karre
Kathryn Marie Krause
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2791

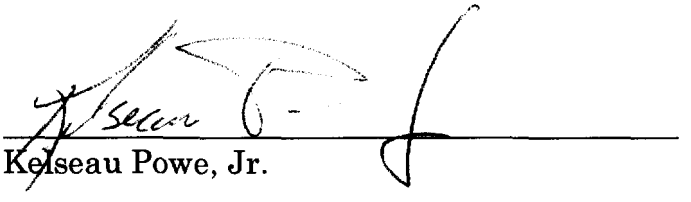
Its Attorneys

Of Counsel,
Dan L. Poole

April 2, 1997

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 2nd day of April, 1997, I have caused a copy of the foregoing **RESPONSE OF U S WEST, INC. TO PETITIONS OF RECONSIDERATION** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.



Kelseau Powe, Jr.

***Via Hand-Delivery**

(CC961496J.COS/DK/lh)

*James H. Quello
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

*Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

*Susan P. Ness
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, DC 20554

*Rachelle B. Chong
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, DC 20554

*Regina M. Keeney
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, DC 20554

*Janice M. Myles
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

*A. Richard Metzger, Jr.
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, DC 20554

*Carol Mattey
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

*Melissa Waksman
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

*Donald Stockdale
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

*Radhika Karmarkar
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

*Richard K. Welch
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

*Michele Farquhar
Federal Communications Commission
Room 5002
2025 M Street, N.W.
Washington, DC 20554

*International Transcription
Services, Inc.
Suite 140
2100 M Street, N.W.
Washington, DC 20037

Frank W. Krogh
Mary L. Brown
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, DC 20036

Walter H. Alford
William B. Barfield
Jim O. Llewellyn
BellSouth Corporation
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, GA 30309-2641

David G. Frolio
BellSouth Corporation
1133 21st Street, N.W.
Washington, DC 20036

Werner K. Hartenberger
Laura H. Phillips
Christina H. Burrow
Dow, Lohnes & Albertson, PLLC
Suite 800
1200 New Hampshire Avenue, N.W.
Washington, DC 20036-6802

COX

Durward D. Dupre
Mary W. Marks
Jonathan W. Royston
Southwestern Bell Telephone Company
Room 3520
One Bell Center
St. Louis, MO 63101

James D. Ellis
Robert M. Lynch
David F. Brown
Southwestern Bell Telephone Company
Room 1254
175 East Houston
San Antonio, TX 78205